Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

Elise Sisk

Petitioner

v.

The State of Virginia

On Petition For Writ of Certiorari
To The Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

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Asheville, NC 28804

48pp

QUESTIONS PRESENTED

1. Whether bad faith law, especially as it relates to insurance companies, applies to the Supreme Court of Virginia in the form of a bad faith tort or breach of contract under the common law protected by the Seventh Amendment.

2. Whether U.S. Supreme Court decisions regarding the "mailbox rule" for prisoners apply equitably to other pro se litigants who reside out-of-state or at a prohibitive distance from the courthouse under the Equal Protection Clause of the Fourteenth Amendment.

3. Whether IRS/DOL rules on time extensions for mailing affected by the terrorist attack of November 11 apply equitably to Court rules for mailing under the Equal Protection Clause of the Fourteenth Amendment.

4. Whether the procedure used by the Supreme Court of Virginia to process motions and petitions conflicts with the Due Process Clause of the Fourteenth Amendment and with the entitlements of 42U.S.C. 1983.

5. Whether the justices of the Supreme Court of Virginia erred in refusing to disclose their findings and in their other misuse of power, thus violating Petitioner's rights/privileges under the Due Process Clause of the Fourteenth Amendment and under 42U.S.C. 1983.

PARTIES TO THE PROCEEDING

The three orders in question (Appendices A, B, C) were signed by clerks of the Supreme Court of Virginia, namely, Jennifer Earle, Deputy Clerk, and David B. Beach, Clerk, in accordance with the Court procedure as outlined in the letter from Patricia Krueger, Chief Deputy Clerk, dated March 6, 2002 (Appendix F). The names of the justices whose orders were thus transmitted are unknown.

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JURISDICTION

The order of the Supreme Court of Virginia to dismiss Petitioner's Petition for Appeal was entered on October 12, 2001. Orders for dismissal of her Petition for Rehearing and her Petition for Appeal of Clerk's Denial were entered on January 11, 2002 and February 22, 2002, respectively.

The jurisdiction of the Supreme Court of the United States rests upon 28 U.S.C., Section 1257(a). District Courts of Virginia and North Carolina and the U.S. Court of Appeals for the Fourth District have already dismissed this case under the Eleventh Amendment since the Petitioner is not from Virginia, making the U. S. Supreme Court the Court of last resort.

CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES INVOLVED

1. First Amendment: right "to petition the government for a redress of grievances".

2. Fifth Amendment, Property Rights and Due Process Clauses: "No person shall be. . .deprived of life, liberty, or property, without due process of law."

3. Fourteenth Amendment, Privileges and Immunities, Property Rights, Due Process and Equal Protection Clauses: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. Title 42 U.S.C. 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

5. U. S. Supreme Court Rule 29(2): "A document is timely filed if it is received by the Clerk within the time specified for filing, or if it is sent to the Clerk through the United States Postal Service by first-class mail (including express or priority mail), postage prepaid, and bears a postmark showing that the document was mailed on or before the last day for filing."

STATEMENT OF THE CASE

The purpose of this Petition for Writ of Certiorari is to obtain a reversal of the dismissal of Petitioner's Petition for Appeal filed in the Supreme Court of Virginia.

The subject case was initiated as a tort claim against the State of Virginia claiming negligence at the University of Virginia which led to Petitioner's fall backwards down a flight of stairs. After being dismissed on the Eleventh Amendment by District Courts in Virginia and North Carolina and the U.S. Court of Appeals for the Fourth District, the case was modified to include a claim for deprivation of due process (under the Fourteenth Amendment and 42U.S.C.1983) and

refiled in the Circuit Court of the City of Charlottesville, where it was dismissed on the Statute of Limitations by the Honorable Judge Edward L. Hogshire on June 15, 2001. (Appendix D). In his Opinion, the Judge found the Petitioner ten months short on time without allowing any time for disability in spite of medical reports and bills showing her to have been in daily or biweekly therapy for more than that time and incapacitated still longer. Because of this injustice, Petitioner filed a Petition for Appeal in the Supreme Court of Virginia.

The Petition for Appeal was mailed by overnight express on September 14, but because of the terrorist attack on September 11, it was not delivered for four days, one day after the required filing date of Monday, September 17. (Appendix E). However, the Petition was timely filed as required by Virginia Code, Section 8.01-674, which applies the "mailbox rule" to the petition for appeal to the Supreme Court of Virginia. (This Statute is quoted on p. 5 of the Argument below).

The Petition was dismissed on Virginia Rule 5:17(1) by Jennifer Earle, Deputy Clerk. (Appendix A). Rule 5:17 says "In every case in which the appellate jurisdiction of this Court is invoked, a petition for appeal must be filed with the clerk of this Court: (1) in the case of an appeal direct from a trial court, not more than three months after entry of the order appealed from."

Petitioner responded with a petition for rehearing (which she termed "Motion To Set Aside Dismissal of Petition for Appeal", thinking that the clerk had made an error) filed on October 22. She included proof of timely mailing including a copy of the required green card and also a letter from Asheville's Postmaster saying that the terrorist attack of September 11 had caused

the mails to be delayed. The Court denied the Petition offering no explanation on January 11, 2002. (Appendix B).

Petitioner replied with a Petition for Appeal of Clerk's Denial filed on January 30, 2002 going into greater detail, including authorities and citing her constitutional protections: "The Fifth Amendment grants all persons the right of due process; the Seventh Amendment grants the rules of common law; the Fourteenth Amendment forbids a state from abridging the privileges of citizens of the United States. . . The absence of a pertinent rule requiring filing with the Clerk of Courts by a particular date with no recourse in the case of a catastrophe like the terrorist attack, would abridge the privileges of citizens who must depend on the mail or other delivery service." (Appendix H, p.38). Although her Petition asked for "argument and authorities" (Id.), the Court again denied the Petition offering no explanation. (Appendix C). Nothing more was allowed to be heard by the Supreme Court of Virginia, so it was impossible to raise the constitutional issues brought up by this final Petition for Appeal of Clerk's Denial: explicitly, the bad faith and the deprivation of due process.

Petitioner also filed a Motion for Stay of Mandate, saying that she intended to file a Writ of Certiorari on the grounds "that the dismissal was constitutionally infirm". The Motion was granted on March 2. Chief Deputy Clerk, Patricia Krueger responded to Petitioner's Motion for Stay of Mandate on March 6, 2002, explaining the procedures followed by the Supreme Court of Virginia in receiving motions and petitions. (Appendix F). This letter demonstrates why due process is impossible in this Court as explained in Section C below.

ARGUMENT

The following three sections argue this case from three different perspectives, the approval of any one of which will result in the reversal of the Virginia Supreme Court's dismissal of Petitioner's Petition for Appeal. In accord with the Court's procedures, no findings accompanied the Court's orders, so the Petitioner does not know the reason for the dismissals.

A. Bad Faith of Virginia Supreme Court Justices

1. Refusal To Apply the "Mailbox" Rule of Virginia and the United States. Petitioner submits that Virginia Supreme Court justices committed acts of bad faith in dismissing her Petition of Appeal for being late when it was timely filed. She assumes that Virginia Code, Section 8.01-674 is adequate proof that her Petition of Appeal was timely filed; it states, "A petition [i.e. a petition for appeal to the Supreme Court] shall for the purposes of Section 8.01-671*, be deemed to be timely if it is mailed postage prepaid to the Clerk by registered or certified mail and if the official postal receipt therefor is exhibited upon the demand of the Clerk or any party and it shows mailing within the prescribed time limits."** She indeed called the clerk's office to ask if this statute applied and was told that it did, so she knows that the dismissal was inequitable. This rule is equivalent to SC R29(2) and similar to FRAP R26(c) and FRCVP R6(e).

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* Section 8.01-671 covers "cases where an appeal is permitted from the trial court to the Supreme Court."

**Petitioner forgot the filing fee and phoned the Clerk of Court's office the next business day to say that it was in the mail; it arrived two days after the Petition, which was within the 10-day time limit specified in Virginia Code, Section vscr-5:17.1(f).)

Even without reference to such a clearcut state law, the U.S. Supreme Court found that a petition was timely filed when it was put in the prison mailbox three days before the due date and arrived one day late, which is the exact situation here. (*Houston v. Lack*, 487 U.S. 266 (1988)). Like the prisoner, Petitioner is a pro se litigant, and being a resident of another state living almost four hundred miles from the Court House, she could not personally travel to the courthouse to see that the notice was stamped "filed". Other mitigating circumstances calling for equitable treatment under the Fourteenth Amendment are that she mailed her petition by overnight express with return green card three days before the due date and that it would have arrived by the due date (Monday, September 17) except for the terrorist attack of September 11. This information was included in four separate documents sent to the Virginia Supreme Court and allegedly seen by judges. (See Letter from Virginia Supreme Court clerk dated March 6, 2002: i.e. Appendix F and quoted on p. 16 below). Recall that, by Black's Law Dictionary, bad faith is defined as "neglect or refusal to fulfill a duty or contractual obligation," which is the exact situation that exists in this case.

2. Bad Faith Tort Law Applied. Bad faith grew out of the common law covering oppression and malice, protected by the Seventh Amendment. "Most jurisdictions allow for some type of bad faith tort action," but the same requirements often hold for all actions, including those against insurance companies. (*Bad Faith: A Fifty State Survey*, by Zurich Re (North American) and Fred A. Smith, III, Sedgwick, Detert, Moran and Arnold, Chicago Office, Section III, paragraph 3). In North Carolina, petitioner's home state, the tort of bad faith was created in 1976 in a property lease case which

had nothing to do with insurance. (*Insurance Bad Faith and Related Topics*, Thompson, Smyth and Cioffi, Thompson, Sanford W. IV, April 1999, p. 4).

Bad faith is certainly viable as a pleading, but because bad faith law has been developed more extensively in the insurance business than in other areas, petitioner has chosen to compare her relationship and treatment by said Court with the bad faith guidelines used by the various states for insurance litigation. The adaptability of this body of law was demonstrated by Wisconsin's Supreme Court in application to HMO's. (*McEvoy v. Group Health Cooperative of Eau Claire*, 213 Wis. 2d 507, 570 N.W. 2d 397 (Wis. Sup. Ct., 1997)). Like insurance companies, Courts have a duty to act in good faith when deciding cases.

As an example, California's tort of bad faith has two elements: "First, an insurer must withhold some kind of benefit under the policy. Second, the tort requires that the reason for the withholding of benefits must be 'without proper cause'." (*Bad Faith: A Fifty State Survey*, op.cit., Section I, paragraph 2, citing *Love v. Fire Ins. Exchange*, 221 Cal. App. 1136, 1151 (1990)). Both of these elements are demonstrated by the Petitioner's case. (The Court supplants the insurer and the Code of Virginia supplants the policy.) The benefit withheld is the Court's decision to let the Petition be judged, which in turn resulted in deprivation of a protected property interest, namely the sum requested in the lawsuit. That the hoped for benefit was withheld without cause is discussed above in the paragraphs on the "mailbox rule". The fact that the dismissal was without cause is further demonstrated by the fact that the Court's orders to dismiss Petitioner's petition for rehearing (entitled

"Motion To Set Aside Dismissal of Petition for Appeal") and Petitioner's Petition for Appeal of Clerk's Denial both lacked any basis in the form of findings. This is in spite of the fact that petitioner wrote in her Petition for Appeal of Clerk's Denial (p. 7), "Appellant requests argument and authorities on her major points, so that she may proceed intelligently with further appeals avoiding voluminous responses that so overtax the courts."

3. The Bad Faith Breach of Contract Applied. Turning now to bad faith breach of contract: "Mississippi Supreme Court decisions establish that its law of bad faith applies to any breach of contract, not merely an insurance contract." (*Pilot Life Ins. Co. V. Dedeaux*, 481 U.S. 41 (1987)). "Alabama's Supreme Court outlined the following as necessary elements of a bad faith claim: (1) an insurance contract between the parties and a breach thereof by the insurer, (2) an intentional refusal to pay the insured's claim, (3) the absence of any reasonable or arguable legitimate reason for that refusal, (4) the insurer's actual knowledge of the absence of any legitimate or arguable reason , and (5) if the intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim." (*Bad Faith: A Fifty State Survey*, op.cit., Section1, paragraph 4; citing *Life Ins. Co v. Gipson*, 682 So.2d 56,57 (Ala. 1996)). Items (2), (3) and (4) have already been discussed and apply. Whether Item (5) applies or not is immaterial since, according to a North Carolina case, "Evidence of negligence, good faith, or lack of intent are not defenses to an action under G.S. Section 75-1.1."* *Insurance Bad Faith and Related Topics*,op.cit.,

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*G.S. Section 75-1.1 provides for a private action.

p. 11; quoting *Miller v. Nationwide Mutual Insurance Co.*, 112 N.C. App. 295, 435 S.E.2d 537 (1993)).

Going back to item (1), although what happened can certainly be classified as a tort, the relationship between plaintiffs and defendants and the courts has a contractual color too. Considering item (1), the written contract is the Code of Virginia, which sets forth not only the guarantees made by the Court but the required actions to be fulfilled by the petitioner in order to warrant the protection of the guarantees. The breach of contract is the failure of the Court to provide the guarantees in the face of the petitioner's compliance (in this case in the form of the filing fee and the timely Petition for Appeal).

Elaborating on the "contract", Petitioner calls attention specifically to (1) Virginia Code, Section 8.01-674 (the "mailbox rule" quoted above); (2) Virginia Supreme Court's Rule 5A:3(a), which states, "an extension for papers to be filed is warranted by the intervention of some extraordinary occurrence or catastrophic circumstance which was unpredictable and unavoidable" (discussed in Section B below), and (3) Virginia Code, Section 8.01-275, which states, "The court shall not regard any defect or imperfection in the pleading, whether it has been heretofore deemed mispleading or insufficient pleading, unless there be omitted something so essential to the action or defense that judgment, according to law and the very right of the cause, cannot be given." As her part of the contract, Petitioner must adhere to the requirements of Virginia Supreme Court Rule 5:17 in filing the Petition for Appeal, and of course, contract-like, must pay the filing fee.

Petitioner's conformance with Rule 5:17 is evidenced by the fact that the court could find nothing but "time" as grounds to dismiss in the period from filing on September 18 until October 12 (date of order to dismiss the Petition for Appeal), even after receiving Attorney Macon's Brief in Opposition to Petition for Appeal. Coincidently, Mr. Macon's Brief does not claim that the Petition was late, for if it had, petitioner would have been clued into the problem and would have immediately addressed the issue, instead of resting secure that the "mailbox rule" would be applied. Petitioner believes that the carelessness and lack of professionalism shown by the Brief , which is even lacking a Certificate of Service, can only be explained by collusion; in other words, the State's Assistant Attorney General knew that the case would be dismissed. (Petioner's "Brief in Opposition to Brief in Opposition to Petition for Appeal" included in Appendix G lists the many inaccuracies and omissions.)

4. Deception of the Virginia Code. The Virginia Supreme Court's failure to live up to the three Codes cited as contractual examples is clear, in spite of the guarantee in Section 8.01-275 that "The Court shall not regard any defect or imperfection in the pleading." This deceptive promise of fairness, which is equivalent to false advertising in insurance law, put the petitioner offguard and led Petitioner to submit a cursory "Motion" addressing the Court's order of dismissal, stating only the mailing date and circumstances, including a copy of the postage receipt and the green card,* together with a letter from the Asheville Postmaster averring that the terrorist attack had caused a delay in delivery. The Code's illusion of fairness resulted in her careless

*Two sets of receipts and green cards dated September 18 are included because petitioner sent a corrected Certificate of Service having forgotten to date it.

omission of references to the pertinent codes and citations to authorities.

5. Failure To Disclose Findings of the Justices. When Petitioner's Motion To Set Aside Dismissal of Petition for Appeal (a motion intended to correct clerk's error in assuming that the Petition was late but corrected to a "petition for rehearing" by the Court) was denied, the order for dismissal failed to include an opinion let alone a justice's name (an omission discussed again in Section C below). This order confused the Petitioner as she sought for a possible reason, still believing there must be one. The omission of a finding caused her response in the form of a Petition for Appeal of Clerk's Denial to "cover all bases", thereby lacking continuity and singleness of purpose. Yet once again she included the pertinent evidence, a copy of the mail receipt and the green card, and this time with appropriate citation to the Virginia Code.

6. Other Bad Faith Considerations. After this Petition was also denied with no opinion or justice's name given, Petitioner submitted a Notice/Petition for Appeal of Clerk's Denial (which was not allowed) and a Motion for Stay of Mandate (which was allowed). These brought the number of documents explaining Petitioner's conformance to Virginia Code in terms of mailing date and circumstances, including the terrorist attack, to four. Clearly Petitioner satisfied still another bad faith requirement; North Carolina asks that the insurer "(1) had enough information to determine that a claim was valid yet nevertheless refused to pay or (2) altogether refused to conduct an investigation and process a claim." (*Insurance Bad Faith and Related Topics*, Ibid., p. 4; quoting *Newton v. The Standard Fire Ins. Co.*, 291N.C.105, 229S.E.2d297 (1976)). Recall that bad faith

common law preceded and served as a foundation for bad faith insurance law in North Carolina and elsewhere.

Petitioner requests restitution for the bad faith tort and breach of contract committed by the Virginia Supreme Court in the form of a U.S. Supreme Court order that the dismissal of her Petition for Appeal be set aside and that the Petition for Appeal be reviewed by the Virginia Supreme Court in good faith and fair dealing. Section C below discusses the relevance of the Fifth Amendment, the Fourteenth Amendment and 42U.S.C.1983 to these bad faith issues.

One additional point pertaining to insurance bad faith law should be cited here. Like Courts, insurance carriers and utilities and common carriers "owe a high duty to the consuming public. Insurance companies have tremendous financial resources which create a 'great disparity' of power and bargaining ability between the companies and claimants." (*Insurance Bad Faith and Related Topics*, Ibid., p. 5; quoting from *Newton v. Standard*, op cit.) The Fourteenth Amendment invests the Courts with similar power. Section C below (p. 18) revisits the issue of the misuse of power by state officials, namely the justices of the Supreme Court of Virginia.

B. Effect of Terrorist Attack of September 11

1. Petition Delayed in Mail by Terrorist Attack. Petitioner's Petition for Appeal, mailed by overnight express mail three days before it was due in the office of the Clerk of the Supreme Court of Virginia, would have been there by the due date if it were not for the terrorist attack. According to Asheville's Postmaster, the grounding of planes caused an excess of mail on the

trucks, keeping some mail off the trucks and preventing its timely delivery. Because of the terrorist attack, said Petition was delivered one day after the due date. (See Petitioner's Motion To Set Aside Dismissal of Petition for Appeal for letter from Asheville's Postmaster). The position of the Supreme Court of Virginia on time extensions must be inferred from Rule 5A:3(a) which states,

> "The times prescribed for filing the notice of appeal, a petition for appeal, and a petition for rehearing and a request for rehearing en banc are mandatory. Except for the petition for appeal which is addressed in Rules 5A:12(a) and Virginia Code, Section 17.1-408, a single extension not to exceed thirty days may be granted if at least three judges of the Court of Appeals concur in a finding that an extension for papers to be filed is warranted by the intervention of some extraordinary occurrence or catastrophic circumstance which was unpredictable and unavoidable."

Both of the citations to Virginia Code refer to the Court of Appeals, so that one must infer that only a petition for appeal addressed to the Court of Appeals is not to be able to be granted an extension and that a petition for appeal addressed to the Supreme Court can be granted an extension. Petitioner declared in her Petition for Appeal of Clerk's Denial that the terrorist attack was a catastrophe covered under Rule 5A:3(a). Yet Virginia Supreme Court justices denied her appeal.

2. Extension of Time Due to Terrorist Attack as Equity Based. As an appendix to her Petition for Appeal of Clerk's Denial, Petitioner attached Federal orders from

the IRS and the Department of Labor on the terrorist attack, which say "Filers who have difficulty in meeting filing deadlines because of disruption of transportation and delivery of documents by mail or private delivery service resulting from the disasters...will have until November 15, 2001 to make their filings." (*"IRS and DOL Respond to Tragedy", Filing Extensions and Other Deadlines*, ASPA ASAP Archive, September 20, 2001, 01-19, G. Neff McGhie, III MSPA, Sierra Pension Services, Reno, NV). Petitioner avers that the failure of Virginia Supreme Court justices to grant her similar latitude exemplifies inequity under the Fourteenth Amendment: that she belongs to the class of filers who experienced disruption of mail delivery.

If the Supreme Court does nothing to remedy this unfairness, one may infer a belief that the terrorist attack was not catastrophic enough to warrant a one-day extension, which leads to the conclusion that the Federal Post Office was instead the culprit. Then we have the situation of one branch of the federal government causing a problem and another branch refusing to remedy it. In either case, the late delivery was not under Petitioner's control.

Petitioner suggests that SC R29(2), FRAP R26(c) and FRCVP R6(e) need to be clarified to deal with the effect of an extraordinary occurrence or catastrophic circumstance, thus putting the response of the Courts in line with that of other government agencies. In the meantime, "Courts may construe implicit exceptions where purely technical application of procedural rules would result in manifest misjustice." (*Elkins v. Derby*, 12 Cal. 3d 410 (1974)).

The equity based decisional rule of tolling was applied

in the case of a plaintiff whose attorney was seriously injured, causing a California statute of limitations to run out. The Court held that the statute of limitations was tolled and cited Civil Code Section 3531, which codifies the maxim of jurisprudence, "The law never requires impossibilities." (*Lewis v. Superior Court* (1985), 175 Cal.App.3d 366). Petitioner requests equal justice under the Fourteenth Amendment.

C. Due Process Guarantees

1. Fourteenth Amendment Guarantees Applied. In discussing the deprivation of Petitioner's due process rights, it is relevant to note that the merits of her case have not yet been heard. The Circuit Court judge set aside her claims opining that she had run ten months short on time, refusing to allow any time for her extensive physical incapacity. The First Amendment guarantees the right to petition the government, which clearly means also the right to have the petition fairly acted upon. The Fifth and the Fourteenth Amendments guarantee the right to due process, which includes the right to have the merits of her case fairly heard. The Virginia Courts have not provided that opportunity.

In Section A above, one element of bad faith was identified as Virginia's deceptive statutes which promised good faith but were not adhered to. In the case of due process rights, "whether the state has authorized the wrong is irrelevant"; the Fourteenth Amendment prevails. (*Home Telephone & Telegraph Co. v. City of Los Angeles*, 227 U.S. 278 (1913)).

Although all of the actions discussed in Section A apply here by undermining Petitioner's right to have her case heard, this section on the Due Process Rights

Clause focuses on the failure of the Supreme Court Of Virginia to disclose findings by the justices. The justice's order to dismiss Petitioner's Motion To Set Aside Dismissal of Petition for Appeal (i.e. petition for rehearing) was not supported by any findings. Neither was the order to dismiss her Petition for Appeal of Clerk's Denial. This is spite of the fact that Petitioner wrote, "Appellant requests argument and authorities on her major points, so that she may proceed intelligently with further appeals avoiding voluminous responses that so overtax the courts." (Petition for Appeal of Clerk's Denial, Appendix H, p. 39).

2. Unconstitutional Procedures of Supreme Court of Virginia. Patricia Krueger, Chief Deputy Clerk of the Supreme Court of Virginia, explains their procedures:

> "In response to your letter, please be advised that no member of the clerk's office rules on a petition or motion. Instead, the motion or petition is presented to a Justice or panel of Justice. The Justice or panel then informs the clerk's office of the ruling and the Clerk or deputy clerk prepares an order in accordance with that ruling. Each of the orders entered in this case was done so at the instruction of the Court and this office is not permitted to explain or interpret them." (*Letter from Patricia H. Krueger, Supreme Court of Virginia,* dated March 6, 2002).

Petitioner maintains that this procedure is at the root of the due process violation. The District Court of New York held that "The decisionmaker need not file a full opinion or make formal findings of fact or conclusions of law but should state the reasons for his determination and indicate the evidence he relied on" and the United

States Supreme Court affirmed. (*Goldberg v. Kelly*, 397 U.S. 254(1970)). The fact that the Petitioner is not in the class of those whose governmental entitlements have ended has no bearing on the questions regarding procedural due process presented in the case:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact finding, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue." (*Id.*, quoting *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959)).

The difficulty Petitioner experienced in trying to prepare her Petition for Appeal of Clerk's Denial has already been described in Section A. The range of issues presented in this Petition for Writ of Certiorari is also directly due to the absence of findings in the orders of the Virginia Supreme Court.* But more important, the dismissal of her case itself may be due to the absence of findings, since she never knew what information to include in her petitions.

An oral hearing would have offset the absence of findings. ("Written submissions do not afford the flexibility of oral presentations; they do not permit the

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*Petitioner had to enter a request for a stay of mandate and risk not seeing the Remittitor because Virginia Code, Section 16.1-118, states that papers in civil cases returned to courts of record may be destroyed if "authorized and directed by an order of the judge of the court in which they are preserved," and Judge Hogshire has so ordered by dismissing Petitioner's case with prejudice.(Appendix D).

recipient to mold his argument to the issues the decisionmaker appears to regard as important." (*Id.*)).

But Virginia Code, Section vscr-5:20 says, "Oral argument on the petition for rehearing will not be allowed."

3. Relevance of 42 U.S.C. 1983. The case entitled Lugar v. Edmondson Oil Company also challenged a state statute of Virginia as being procedurally defective under the Due Process Clause of the Fourteenth Amendment. The Court found that this challenge presented a valid cause of action under 42U.S.C.1983, which provides a remedy for deprivation of constitutional rights when that deprivation takes place "under color of any statute, custom, or usage of a State". (*Lugar v. Edmondson Oil Co.*, 457U.S.922 (1982)). However, in that case, the petitioner alleged "only misuse or abuse of the statute" and not misuse by a "state actor". In Petitioner's case, not only is the deprivation caused by the exercise of a rule imposed by the State (i.e. its employees), but also the parties charged with the deprivation are "State officials", Virginia Supreme Court justices, and therefore "state actors".

Extending Petitioner's claim that the procedures of the Supreme Court of Virginia are unconstitutional under 42U.S.C.1983, she reminds us that Section A above described bad faith as a misuse of power, which was possessed by virtue of state law and made possible only because the wrongdoers were clothed with the authority of state law (i.e. acted under color of state law). The "state action" requirement of the Fourteenth Amendment is actually identical with the "under color of state law" requirement of 1983. (*United States v. Classic*, 313U.S.299,326 (1941)). Both requirements were met in Petitioner's case and both sources of

entitlement are bars to the actions of Virginia's Supreme Court justices. She requests that the U.S. Supreme Court require these justices to set aside their dismissals and proceed with a consideration of her Petition for Appeal in the good faith accorded by the U. S. Constitution.

CONCLUSION

The judgment of the Supreme Court of Virginia should be reversed.

Respectfully submitted,

Elise Sisk, pro se
1101 Timber Trail
Asheville, NC 28804
(828) 254-4003

April 11, 2002

Appendix A

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday **the** 12th **day of** October, 2001.

Elise Sisk, Appellant,

against

Record No. 01219
Circuit Court No. 00-229

State of Virginia, Appellee.

From the Circuit Court of the City of Charlottesville

Finding that the appeal was not perfected in the manner provided by law, the Court dismisses the petition for appeal filed in the above-styled case. Rule 5:17 (a) (1).

A Copy,

Teste:

David B. Beach, Clerk

By: s/Jennifer Earle

Deputy Clerk

Appendix B

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday **the** 11th **day of** January, 2002.

Elise Sisk, Appellant,

against

Record No. 01219
Circuit Court No. 00-229

State of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the motion of the appellant, which is treated as a petition to set aside the judgment rendered herein on the 12th day of October, 2001 and grant a rehearing thereof, the prayer of said petition is denied.

A Copy,

Teste:

s/ David Beach
Clerk

Appendix C

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday **the** 22th **day of** February, 2002.

Elise Sisk, Appellant,

against

Record No. 01219
Circuit Court No. 00-229

State of Virginia, Appellee.

From the Circuit Court of the City of Charlottesville

On January 30, 2002 came the appellant, in proper person, and filed a "Petition for Appeal of Clerk's Denial" in this case.

On consideration whereof, the Court refuses the petition.

A Copy,

Teste:

s/ David Beach
Clerk

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE

ELISE SISK,
Plaintiff

v. **Case No. 00-229**

STATE OF VIRGINIA,
Defendant

FINAL ORDER

On March 1, 2001, the parties appeared before this Court by telephone upon the Defendant's Demurrer, Plea in Bar and Plea of Immunity.

Upon consideration of the record before the Court and the arguments of both parties, this Court finds that Plaintiff's claims are barred by the applicable Statute of Limitations, Virginia Code Sections 8.01-195.7 and 8.01-229, and Defendant's pleas should be granted. It is hereby ORDERED, ADJUDGED AND DECREED THAT THIS CASE BE DISMISSED WITH PREJUDICE. The matter shall be removed from the docket of this Court.

The objections of Ms. Sisk are noted.

The Clerk of the Court is hereby directed to send a copy of this Final Order to counsel for Defendant and Ms. Elise Sisk, 1101 Timber Trail, Asheville, NC 28804.

Endorsement of the parties is waived.

A COPY TESTE ENTER: s/Edward Hogshire
PAUL GARRETT, CLERK DATE: 6/15/01
s/(can't read), **DEP.CLERK**

Appendix E

012109

CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
SEPT 18, 2001
RICHMOND, VIRGINIA

IN THE SUPREME COURT
FOR THE STATE OF VIRGINIA

Elise Sisk, Plaintiff

v.

State of Virginia,
Defendant

Case: 00-229

PETITION FOR APPEAL
September 14, 2001

Elise Sisk, Plaintiff/Pro Se
1101 Timber Trail
Asheville, NC 28804
(828) 254-4003

State of VA, Defendant
Edward Macon, Counsel
Office of Atty. General
900 East Main Street
Richmond, VA 23219
(804) 786-3374

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for Appeal was mailed this _____ day of September, 2001 to Edward M. Macon, Assistant Attorney General, 900 East Main Street, Richmond, VA 23219.

s/ Elise Sisk
Elise Sisk (pro se)

Appendix F

SUPREME COURT OF VIRGINIA
DAVID B. BEACH, CLERK
Supreme Court Building
100 North 9th Street, 5th Floor
Richmond, Virginia 23219
(804) 786-2251 V/TDD
FAX: (804) 786-6249
March 6, 2002

Ms. Elise Sisk
1101 Timber Tr
Asheville, NC 28804

Patricia Krueger
Chief Deputy Clerk

Re: Elise Sisk
v. State of Virginia
Record No. 012109

Dear Ms. Sisk:

This will acknowledge receipt of your letter and motion for stay of mandate in the above-styled case on March 4, 2002. In response to your letter, please be advised that no member of the clerk's office rules on a petition or motion. Instead, the motion or petition is presented to a Justice or panel of Justice. The Justice or panel then informs the clerk's office of the ruling and the Clerk or deputy clerk prepares an order in accordance with the ruling. Each of the orders entered in this case was done so at the instruction of the Court and this office is not permitted to explain or interpret them. Therefore, no further explanation is available other than what is contained in the orders. The only appeal from a decision of this Court is to the United States Supreme Court, One 1st Street, N.E., Washington, D.C. 20543, (202) 479-

3000. You would need to contact that Court directly for information about how to perfect an appeal from this Court's decisions. When this Court has ruled on your motion for stay of mandate, an order will be forwarded to you.

Sincerely,

s/Patricia

H.Krueger

Patricia H. Krueger
Chief Deputy Clerk

PHK/glf

cc: Hon. Edward M. Macon

Appendix G

CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
OCT 16, 2001
RICHMOND, VIRGINIA

012109

IN THE SUPREME COURT
FOR THE STATE OF VIRGINIA

ELISE SISK, Appellant,

v. Record No. 012109

STATE OF VIRGINIA, Appellee.

BRIEF IN OPPOSITION TO BRIEF IN OPPOSITION
TO PETITION FOR APPEAL
OCTOBER 12, 2001

Mr. Macon does not address any of Appellant's major points: namely,

1. Appellant resides in North Carolina, not Virginia, so that federal law takes precedent (e.g. see Petition for Appeal, pp. 19, 20-21 and 28-29).

2. In her Petition for Appeal, Appellant uses extensive legal authorities to define "incapacity" and to prove that she was incapacitated for one year and seven months after the accident. According to Virginia code, her incapacity should be tolled in 1999 but need not have occurred in 1999 as the Judge asserts (See

Petition for Appeal, pp. 21-25).

3. The most flagrant violation of Appellant's due process rights was the Commonwealth's refusal to share evidence (See Petition for Appeal, pp. 26-28 and Appendix 1 attached, which was omitted from the case files sent by the Circuit Court and is referenced on p. 26, line 25).

4. "Courts may construe implicit exceptions where purely technical application of procedural rules would result in manifest injustice" and "The court may relieve a party or a party's representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect." Appellant cites a Fourth Circuit case in which four months additional time was indeed granted to the Defendant (See Petition for Appeal, pp. 30-31).

5. The lawsuit filed in the U.S. District Court in Asheville, N.C. was a non-suit and therefore entitled to be tolled for six months in accordance with Virginia code. (See Petition for Appeal, pp. 6, 12-13, 19).

6. Mr. Macon's list of Appellant's Assignments of Error on pages 2-3 omits Appellant's Procedural Errors, Sections (a)(1)-(a)(4), which constitute the major basis for Appellant's request that the Judge's final order be set aside as prejudicial, discriminatory, and illegal (See Petition for Appeal, pp. 5-6, 11-12, and 16-17).

Mr. Macon makes numerous errors in his allegations: for example,

1. Mr. Macon asserts on page 2 that Appellant accuses

the Judge of prejudice of her lawsuit based on the statute of limitations. Her subject index lists pages 5, 6, 8, 9, 12,16,17, under "Prejudicial". None of these pages are concerned with the Statute of Limitations.

2. Mr. Macon asserts on page 4, "Ms. Sisk failed to offer credible, admissible evidence to the trial court to demonstrate that she was incapacitated within the meaning of Virginia Code Section 8.01-229." The exhibits on R. 33-51, 80-81, 83-89 and Appendix 2 attached (which was omitted from the case files sent by the Circuit Court and is referenced in Petition for Appeal, p. 22, line 17) are all medical exhibits supporting Appellant's Memorandum of Law submitted in accordance with Judge Hogshire's instructions during the telephone "trial" (R. 67-73) The only missing evidence is the expert witnesses Appellant would bring to court if she ever had a jury trial.

3. Mr. Macon asserts on page 5, "Ms. Sisk cites no authority to support her novel claim that the statute of limitations should be tolled for the time period of November 17, 1999 through March 27, 2000, when she was travelling abroad." Too bad that Mr. Macon didn't realize that there is a separate section in her Petition for Appeal headed "Principles of Law, the Argument and Authorities", which is where he could have found extensive authority (See pp. 20-21).

4. Mr. Macon asserts on p. 5 that there is an inconsistency in Appellant's hospitalization on October 2, 2000 (R. 65 for evidence) and her first filing of the subject lawsuit on October 3, 2000 (R. 64 for evidence). If Mr. Macon had read carefully, he would have noted that she mailed the complaint on September 28 and it was <u>received</u> on October 3.

5. Mr. Macon asserts on p. 6 that the Appellant makes no claim that she was ever adjudged by a court to be incapacitated. This is exactly what Appellant has objected to: that she has never been allowed to appear in court before a jury with expert witnesses so that she can be so adjudged (See Petition for Appeal, "Jury Issue", pp. 5, 8, 11, 17).

6. Mr. Macon asserts on p. 6, "Ms. Sisk asserts that she was hospitalized for approximately three weeks following her accident on November 3, 1996." Appellant flatly denies this allegation. Appellant is not in the habit of lying, and that would be a lie.

7. Mr. Macon asserts on p. 5, "Once these periods of tolling are accounted for (i.e., the two Federal lawsuits filed by Appellant), Ms. Sisk filed her lawsuit in the trial court approximately ten months late." This cannot be correct since the Judge says the same thing and he gives the Appellant four months and three weeks too short a time for the Lynchburg lawsuit (by using the original dismissal date of June 1 rather than the Mandate date of July 21, 1999; and by not allowing the three months for a Petition for Writ of Certiorari per Mr. Macon's footnote on page 8) and two months and three weeks too short a time for the Asheville lawsuit by not including it at all. (The two months and three weeks extends from the filing of the Asheville lawsuit until the filing of the current lawsuit, which is allowed by Virginia's code for a non-suit.) (See Petition for Appeal, pp. 6, 12-13, 18-19.)

Conclusion

Since Mr. Macon does not offer authority contradicting any of the points made herein, and since the Appellant does cite authority, Appellant prays that the Honorable

Judge will take the fair and legal route by finding in her favor and allowing a trial by jury to proceed in Circuit Court. Appellant invites the Judge to read her Petition for Appeal for other points that have not been mentioned here that also support her case and add to the time that should be tolled.

Respectfully submitted,

s/ Elise Sisk

ELISE SISK, Plaintiff
acting pro se
Ms. Elise Sisk
1101 Timber Trail
Asheville, NC 28804
(828) 254-4003

Appendix H

CLERK
SUPREME COURT OF VIRGINIA
RECEIVED
JAN 30, 2002
RICHMOND, VIRGINIA

IN THE SUPREME COURT
FOR THE STATE OF VIRGINIA

Elise Sisk, Appellant — Cir. Ct. Case: 00-229
Record No.: 012109

-v-

State of Virginia,
Appellee

PETITION FOR APPEAL
OF CLERK'S DENIAL

January 28, 2002

Elise Sisk, Appellant and Pro Se
1101 Timber Trail
Asheville, NC 28804
(828) 254-4003

State of Virginia,Appellee
Edward Macon, Counsel
Office of Attorney General
900 East Main Street
Richmond, VA 23219
(804) 786-3374

PETITION FOR APPEAL OF CLERK'S DENIAL

Statement of Nature of Case and Proceedings

Appellant's civil suit was dismissed in the Circuit Court for the City of Charlottesville on 6/15/01, on the statute of limitations without being heard on its merits. Appellant subsequently mailed a "Petition for Appeal" on 9/14/01 to the Supreme Court of Virginia by overnight express. The Petition was due on 9/17, since

9/15 fell on a Saturday. Because of the terrorist attack on 9/11 mail was delayed and the Petition arrived on 9/18. On 10/12/01, Clerk (#1) dismissed the Petition on the basis of the time requirement (See Appendix 1 for her judgment).

Appellant submitted a "Motion To Set Aside Dismissal of Petition for Appeal" with supporting exhibits on 10/17/01 (See Appendix 2 for Appellant's "Motion. . ."). Attached were copies of mail receipts proving that the Petition was mailed by overnight express with return green card on 9/14 and a letter from Asheville's Postmaster explaining that the terrorist attack had caused the mails to be delayed. On 1/11/02, Clerk (#2) denied Appellant's request that the due date be extended for one day and that the dismissal of the "Petition for Appeal" be set aside (See Appendix 3 for her judgment).

Comes now the Appellant, Elise Sisk acting pro se, and moves this Honorable Supreme Court of Virginia to (1) reverse your clerk's denial of Appellant's "Motion To Set Aside Dismissal of Petition for Appeal" and (2) allow Appellant's "Petition for Appeal" to be heard. Appellant avers that said denial is a clerical error or that it is illegal and unconstitutional or both.

Assignments of Error

Based on Virginia Code, Section 8.01-275, the anonymous clerk (#2)(signature illegible) erred in not reversing Ms. Earle's (clerk #1) dismissal of the Appellant's "Petition for Appeal" when he/she saw Appellant's evidence in "Motion To Set Aside Dismissal of Petition for Appeal" that said Petition had indeed been mailed in a timely fashion in accord with Virginia Code, Section 8.01-674. Based on Virginia Code, Section vscr-6:3-3(1), if there was any question regarding the

applicability of 8.01-674, he/she further erred in not submitting the "Motion To Set Aside Dismissal of Petition for Appeal" to a judge instead of judging himself/herself the applicability of Virginia Code, Sections 8.01-674 and vscr 5:5(a) and (b) (See also discussion of Rule 5A:3(a) in "Principles of Law. . ." below.)

Questions Presented

Is it not law that a party to a lawsuit need not cite a Virginia Code to have it apply?
Is it not illegal for a clerk to set aside a motion when doing so is in direct contradiction to Virginia Code?
Is it not a law that a judge shall decide matters before the court when it is obvious that disqualification is in question, such as in Appellant's "Motion. . ." to extend the filing time by one day based on the mail delay due to the terrorist attack?
Is not deprivation of a required review by a judge a constitutional issue?

Statement of Facts

Appellant's suit was dismissed in the Circuit Court for the City of Charlottesville on 6/15/01, on the statute of limitations without being heard on its merits. Appellant subsequently mailed a "Notice of Appeal" on 7/3/01 and a "Petition for Appeal" on 9/14/01 with return green card to the Supreme Court of Virginia by overnight express. The Petition was due on 9/17, since 9/15 fell on a Saturday. Because of the terrorist attack on 9/11 mail was delayed and the Petition arrived on 9/18. On 10/12/01, Clerk (#1), Jennifer G. Earle, dismissed the Petition on the basis of Rule 5:17(a)(1), which pertains only to time.

Appellant submitted a "Motion To Set Aside Dismissal of Petition for Appeal" with supporting exhibits on 10/17/01. Attached were copies of mail receipts

proving that the Petition was mailed by overnight express on 9/14 and a letter from Asheville's Postmaster stating that the "Motion. . ." was so mailed and that the terrorist attack of 9/11/01 had caused the mails to be delayed. On 1/11/02, Anonymous Clerk (#2) decided that the "Motion. . ." was actually a "petition for rehearing" and denied Appellant's request that the due date be extended for one day and that the dismissal of the "Petition for Appeal" be set aside.

Principles of Law, the Argument and Authorities

According to Virginia's Code, Remedies and Procedures, Section 8.01-670, Decisions under Prior Law, "Their plain remedy was by appeal and if that had been denied, they could have appealed from that denial." In appealing Anonymous Clerk's (#2) denial of rehearing, Appellant also cites Virginia Code, Section 8.01-677, "Errors corrected on motion," and moves that the denial be set aside because of error and a rehearing be granted to include the argument and authorities presented herein. If the court is of the opinion that the clerk did not make an error, then adequate grounds for review can be found in the fact that his/her judgment was illegal in not adhering to Virginia Code, Section 8.01-674 and unconstitutional in usurping the authority of a judge to determine himself/herself whether the "mailbox rule" applied and whether the terrorist attack was a catastrophe (in terms of Virginia Code, Section vscr 5.5(a) or alternatively Rule 5A:3(a)). "The Supreme Court, on the petition of a party, shall rehear and review any case decided by such court if one of the justices who decides the case adversely to the petitioner certifies that in his opinion there is good cause for such rehearing" (Virginia Code, Section 8.01-675.2). Since no judge ever reviewed the case and decided it adversely, there is no one to fit

the law; therefore, review should be automatically required.

Virginia Codes, Section 8.01-674 or alternatively vscr-5.5(b) and Section vscr 5.5(a) or alternatively Rule 5A:3(a) apply to Appellant's "Motion To Set Aside Dismissal of Petition for Appeal" although they are not explicitly mentioned. They are essential rulings pertaining to the time requirements of the "Petition of Appeals" and so obvious that they should be known by any clerk of court. According to Virginia Code, Section 8.01-275, they should not have to be cited by the Appellant to be applied: "The court shall not regard any defect or imperfection in the pleading, whether it has been heretofore deemed mispleading or insufficient pleading, unless there be omitted something so essential to the action or defense that judgment, according to law and the very right of the cause, cannot be given."

Your clerk erred in denying Appellant's Motion in direct contradiction to Virginia Code, Section 8.01-674, which states "A petition shall, for the purposes of Section 8.01-671, be deemed to be timely if it is mailed postage prepaid to the Clerk by registered or certified mail, . . . and it shows mailing within the prescribed time limits." As proven in Appellant's "Motion. . ." (See Appendix 2), the Petition for Appeal was mailed by overnight express mail on September 14, 2001, and it was not due until September 17, 2001. It would have easily arrived in two days on September 17 except for the terrorist attack. In citing Virginia Code, Section 8.01-674 as the authority for proving that her "Petition for Appeal" was timely, Appellant assumes that the cited section refers to Section 8.01-671, which covers "cases where an appeal is permitted from the trial court to the Supreme Court", as is the present case. In addition to 8.01-674 Appellant cites Virginia Code, Section vscr-5A:3(c), which adopts the "mailbox rule" for the comparable Virginia Court of Appeals (Appellant's

"Petition for Appeal" did not pass through the Court of Appeals and therefore should be awarded the consideration that would have been received there.) (See also Houston v. Lack, 487 U.S. 266 (1988) on the "mailbox rule".)

Even without Section 8.01-674, Appellant's "Petition for Appeal" should not have been dismissed for arriving by mail one day after the deadline, because the terrorist attack places it under the jurisdiction of the Virginia Supreme Court's Rule 5A:3(a), which states, "an extension for papers to be filed is warranted by the intervention of some extraordinary occurrence or catastrophic circumstance which was unpredictable and unavoidable." Only the petition for appeal for the Virginia Court of Appeals is exempt from this law and covered under Rule 5A:12(a) and Section 17.1-408. Grammatically, the lack of a comma after "petition for appeal" in the second sentence, being restrictive, confirms this interpretation. The petition for appeal for the Virginia Supreme Court is not mentioned as an exception and so is apparently covered. If not, it is covered by Virginia Code, Section 5.5(a).

Let us consider the event that the "mailbox rule" of 8.01-674 were to be inequitably ignored. Then we enter a grey area in which a decision must be made as to whether to extend the filing time for Appellant's "Petition for Appeal" for one day, and Virginia Code, Section vscr-6:3-3(1) applies: "A judge shall hear and decide promptly matters assigned to the judge except those in which disqualification is *required.*" Disqualification is not required, so a judge should be involved, which the clerk did not do. In Appellant's "Motion. . ." (See Appendix 2), Appellant included a letter from the Postmaster of Asheville, explaining that the express mail was delayed the week after the terrorist attack, when Appellant's "Petition for_Appeal" was mailed. Virginia Code, Rule 5A:3(a) of the Supreme Court

of Virginia (alternatively Section vscr-5.5(a)) provides for an extension to the time (not to exceed thirty days) for the Petition of Appeal when a catastrophe is involved. The terrorist attack clearly falls into this category. As additional evidence of the catastrophic nature of the terrorist attack, Appellant is also attaching Federal orders from the IRS and the Department of Labor, saying "Filers who have difficulty in meeting filing deadlines because of disruption of transportation and delivery of documents by mail or private delivery service resulting from the disasters . . . will have until November 15, 2001 to make their filings" (See Appendix 4). See also Virginia Code, Section vscr-5A:3(c) for the Virginia Court of Appeals, which provides that "The times prescribed in these Rules for filing papers may be extended by a judge of the court in which the papers are to be filed on motion for good cause shown and to attain the ends of justice."

One more issue requires discussion here, in case the court decides that the terrorist attack is not a catastrophic event as covered by Virginia Code, Section vscr-5A:3(a) or vscr-5.5(a), the time for the Petition of Appeal has been extended on constitutional grounds. The anonymous clerk's (#2) act of usurping the judge's prerogative of review and decision deprived the Appellant of her due process and common law rights to be heard by a judge and is therefore a constitutional issue. The Fifth Amendment grants all persons the right of due process; the Seventh Amendment grants the rules of common law; the Fourteenth Amendment forbids a state from abridging the privileges of citizens of the United States. Also, relying again on the Fourteenth Amendment, the absence of a pertinent rule requiring filing with the Clerk of Courts by a particular date with no recourse in the case of a catastrophe like the terrorist attack, would abridge the privileges of citizens who must depend on the mail or other delivery service. (See

Appendix 4 for the opinion of the federal government that an extra month should be allotted in cases of mail-dependency after the terrorist attack.) The subject dismissal raises a constitutional issue and should therefore be considered by a judge and corrected to also allow Appellant's "Petition for Appeal" a judge's consideration.

Conclusion

Because Appellant's "Motion To Set Aside Dismissal of Petition for Appeal" was not given to a judge for review and decision, Appellant begs first that anonymous clerk's (#2) judgment to deny a rehearing be set aside and Appellant's "Motion. . ." be considered by a judge along with the more substantial arguments and authority presented herein. Appellant does not say "reheard" because the "Motion. . ." was never "heard" in the beginning. Secondly, Appellant begs that her "Motion To Set Aside Dismissal of Petition for Appeal" be adopted to reverse Ms. Earle's (Clerk #1)) dismissal of the "Petition for Appeal". Said Petition was (1) timely filed by the "mailbox rule" and (2) one day late in court only because airplanes were grounded and truck mail was overtaxed by the catastrophic terrorist attack.

In case the honorable judge is leaning toward supporting the two dismissals, Appellant asks him to consider one additional authority: "Courts may construe implicit exceptions where purely technical application of procedural rules would result in manifest injustice" (Elkins v. Derby, 12 Cal. 3d 410 (1974)). In case of such an unjust verdict, Appellant requests argument and authorities on her major points, so that she may proceed intelligently with further appeals avoiding voluminous responses that so overtax the courts.

TABLE OF CITATIONS

Amendments to the U.S. Constitution
Amendments 5,7,14
Virginia Statutes
Virginia Code, Rule 5A:3(a) of the Supreme Court of Virginia
Virginia Code, Rule 5A:12(a)
Virginia Code, Rule 5:17(a)(1) of the Supreme Court of Virginia
Virginia Code, Section vscr-5A:3(c)
Virginia Code, Section vscr-5.5(a) and (b)
Virginia Code, Section vscr-6:3-3(1)
Virginia Code, Section 8.01-271.1
Virginia Code, Section 8.01-275
Virginia Code, Section 8.01-670, Decisions Under Prior Law
Virginia Code, Section 8.01-671
Virginia Code, Section 8.01-674
Virginia Code, Section 675.2
Virginia Code, Section 677
Virginia Code, Section 17.1-408

Lawsuits
Elkins v. Derby, 12 Cal. 3d 410 (1974)
Houston v. Lack, 487 U.S. 266 (1988)

s/ Elise Sisk
Petition for Appeal Elise Sisk (pro se)

APPENDIX 2

Track/Confirm - Intranet Item Inquiry - Domestic

Item: ET13 2444 003U S Date/Time Mailed: 09/14/2001 17:10

Destination	Zip: 23219	City: RICHMOND	State: VA
Origin	Zip: 28804	City: ASHEVILLE	State: NC

Class: Express Mail - PO to Addressee
Scheduled Delivery: 09/16/2001
Weight: lb: 2 oz: 5 Postage: $20.65

Special Services	
RETURN RECEIPT	$1.50

Delv Rqmt: Normal Po Box?: N

Event	Date	Time	Location
DELIVERED	09/18/2001	09:36	RICHMOND VA 23219
	Recipient : 'C HERBERT'		
	Request Delivery Record		
	View Delivery Signature and Address		
ARRIVAL AT UNIT	09/18/2001	07:43	RICHMOND VA 23250
ENROUTE	09/18/2001	00:29	RICHMOND VA 23250
ENROUTE	09/14/2001	18:51	ASHEVILLE NC 28810
ACCEPT OR PICKUP	09/14/2001	17:10	ASHEVILLE NC 28804